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use this material as it did use it, it had the right to sell it or to give it to the contractor as a part of his compensation. When the earth and gravel were dug up, and were no longer used for street purposes, they became the property of the abutting owner, subject only to the right of the city to use them in improving other streets under the same general plan of improvement.

"When the abutting owner surrenders such rights as the public easement requires, it may be said that he impliedly agrees to surrender his right to the soil should the municipality need it in repairing or improving that particular way or system of which that is a part, and which the law presumes enhances the value of his property. But this is carrying the rule to its limit, and it will not do to say that he impliedly agreed that his property might be taken by the municipality to enhance the value of the property of some one else. The city could not, as of right, take the material and use it for the purposes it did use it. So that, unless it acquired this right in some way at some stage of the proceedings, the right did not exist, and such taking was wrongful, and a right of action accrued to the injured party."

The cases on this subject are not altogether harmonious. See *Sadler's Case*, 104 N. Y. 229; *Smith v. Rome*, 19 Ga. 89; *Bissell v. Collins* (Mich.), 15 Am. Rep. 217; *Lawrence v. Nahant*, 136 Mass. 477.

NEGLIGENCE—FIRE SET BY LOCOMOTIVE—PROXIMATE CAUSE.—A question of some novelty is presented in the recent case of *Cook v. Minneapolis etc. R. Co.*, 74 N. W. 561, decided by the Supreme Court of Wisconsin. The action was against a railroad company to recover damages for the destruction of the plaintiff's property, alleged to have been caused by fire negligently set from the defendant's locomotive. The proof was that a fire was negligently caused on or near the right of way by the defendant's locomotive, and that such fire gradually extended until it reached and destroyed the plaintiff's property. But it was further proved, and the jury found as a fact, that before the fire set by the railroad company reached the property of the plaintiff, which was several miles from the point where the fire began, another fire, of unknown origin, coming from a different direction, united with it, and by force of a heavy gale prevailing the united fires swept over the plaintiff's property, destroying fences, barns and dwelling. The jury also found, and this is the chief source of difficulty in the case, that either of the fires would have caused the plaintiff's loss, without the assistance of the other, and at the same time and to the same extent. In other words, the fire of unknown origin would have destroyed the property, at the very time it was destroyed, even had the railroad company not set any fire at all; and, on the other hand, the fire set by the defendant company would still have wrought the same damage, and at the same time, had the fire of unknown origin not united with it. The question presented was whether the negligence of the railroad company was the proximate cause of the loss.

It is well settled that where the wrongful act of two wrongdoers concurs in producing an injury to a third person, either or both may be held liable for the entire damage. But here there was no proof of concurrent negligence, since the source of one of the fires was not ascertained. The court held, in a learned opinion, that under the circumstances it could not be said with reasonable certainty that the

negligence of the railroad company was the proximate cause of the loss. We extract a portion of the opinion :

"The law of negligence is laid on reasonable lines, the same as any other branch of jurisprudence. The theory upon which compensation goes to an injured person from another whose negligence proximately caused the injury, is not that of punishment for the wrong, but that, in justice to such person, compensation is due for the damages caused to him by such negligence, so far as the same can be reasonably ascertained. Where the wrong of one person concurs with that of another under such circumstances that the injury would not result without the concurrence, it is reasonable to hold each liable for the entire loss, because the same would not have occurred if the negligence of either were absent. Notwithstanding the concurrence of the two causes, each, in a sense, under such circumstances, is the proximate cause of the loss, because there was responsible human causation back of it, without which the injury would not have happened. Again, where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say that there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety. But where a cause set in motion by negligence, reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause, entirely regardless of the other, then the consequence cannot be said, with any degree of certainty, to relate to negligence as its antecedent; requisite intelligent causation necessary to legal liability is wanting, leaving no ground, in reason or in law, for it to rest upon.

"To further illustrate: If an injury accrues to a person from inability to control his team, where that is more than momentary, concurring with a defect in the highway, and the injury would not otherwise happen, the mere concurrence of negligence of the municipality responsible for the defect will not render the corporation liable, because the condition of the team is deemed to be the real producing cause. *Jackson v. Town of Bellevieu*, 30 Wis. 250; *Houfe v. Town of Fulton*, 29 Wis. 296; *Schillinger v. Town of Verona* (Wis.), 71 N. W. 888; *Loberg v. Town of Amherst*, 87 Wis. 634, 58 N. W. 1048; *McFarlane v. Town of Sullivan* (decided at this term, and not yet officially reported) 74 N. W. 559; *Scannal v. City of Cambridge*, 163 Mass. 91, 39 N. E. 790; *Babson v. Rockport*, 101 Mass. 93; *Palmer v. Andover*, 2 Cush. 600. Applying the same doctrine, in *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, the court held that where several concurring acts or conditions of things, one of them a wrongful act or omission of some person, under such circumstances that such person might reasonably have anticipated such an injury as the natural and probable result of his act or omission, he is liable, provided the injury would not have occurred without it. The general rule, so recognized and applied by that court, was stated by the judge who wrote the opinion, thus: 'In case of tort, the rule as to the proximate cause is, that where several acts or conditions of things produce an injury, if one is the wrongful act

or omission of the defendant and it would not have occurred without his act, and he might reasonably have anticipated the result as a natural consequence of such act, that is the proximate cause of the result.' That is quite inconsistent with the construction of the opinion of the same court in *McClellan v. Railway Co.* (Minn.) 59 N. W. 978, confidently pressed upon our attention, but accords with the construction which we have given to it and which was clearly what the court intended, though, as before indicated, language was used that might lead to a different conclusion unless viewed in the light of settled legal principles. It may safely be said that the rule stated in *McClellan v. Railway Co.*, applies in all cases where negligence of a party concurs with some other cause not traceable to a responsible source. 16 Am. & Eng. Enc. Law, p. 441, and notes; 2 Thomp. Neg. 1085; Shear. & R. Neg. sec. 33; Whit. Smith Neg. sec. 44; *Ring v. City of Cohoes*, 77 N. Y. 83; *Ayres v. Village of Hammondsport*, 130 N. Y. 665, 29 N. E. 265; *Ilfrey v. Railway Co.*, 76 Tex. 63, 13 S. W. 165; *Railway Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14.

"The logical deduction from the foregoing is that where an injury accrues to a person, by the concurrence of two causes, one traceable to another person under such circumstances as to render him liable as a wrongdoer, and the other not traceable to any responsible origin, but is of such efficient or superior force that it would produce the injury regardless of the responsible cause, there is no legal liability. No damage in such circumstances can be traced, with reasonable certainty, to wrongdoing as a producing cause. The one traceable to the wrongdoer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows.

"From the foregoing the conclusion is easily reached that the defendant in this case is not liable for the fire loss from the facts found by the jury. Its negligence, even if operating up to about the instant the fire entered the plaintiffs' property, was there superseded by the independent northwest fire. Whether it can be said that after the two fires became one, the element attributable to the defendant continued, though its identity was lost in the combination and it was superseded by the fire that swept down upon the property from the northwest, it cannot be said that the result which followed would not have occurred but for such responsible element. On the contrary it stands as a verity in the case that it would have occurred just the same, regardless of the negligent fire."

Involved in the same suit was a claim by the plaintiff for several horses killed by the defendant's train on the day of the fire. The track was not fenced as required by law. The proof was that if the track had been fenced, the same united fires would have destroyed the fencing. The court held, therefore, that failure to fence was not the proximate cause of the death of the animals, and, in the absence of other proof of negligence, judgment for damages against the railroad company for the value of the horses was reversed.

THE bursting of a hogshead of molasses by reason of fermentation is held, in *Faucher v. Wilson* (N. H.), 39 L. R. A. 431, to be a loss which a common carrier does not insure against, as it results from the operation of natural laws.

A STATUTE reducing the power of a city to levy taxes for the payment of a judgment against it for a tort is held, in *Sherman v. Langham* (Tex.), 39 L. R. A. 258, to be valid and not a deprivation of the property of the judgment creditor without due process of law.